CRIMINAL CONSPIRACY[1]

IN those fields of industrial controversy where passion runs high and where class conscious groups are arrayed in bitter fight the one against the other, where each side with difficulty is restrained from open war and induced to substitute therefor settlement by judicial action, the law has a very difficult and delicate function to fulfill. Under the terrific thrust and strain of some of the most tremendous social issues of the day, it is of far more than usual importance that the law applicable to labor controversies should express principles of justice evident to and accepted by the great mass of mankind; above all else, such law must be thoroughly predicable. Otherwise class groups will see in legal decisions only the prejudice and bias of the individual judges; and popular respect for the law and its administration by the courts will wane to a possible danger point.

A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is a veritable quicksand of shifting opinion and ill-considered thought.[2] That this uncertain doctrine should be seized upon, perhaps because of its very vagueness, as one of the principal legal weapons with which lawyers press their attack in labor controversies and in which judges find an easy and frequent support

[1] A most admirable book dealing with the subject of Criminal Conspiracy is that of R. S. WRIGHT, THE LAW OF CRIMINAL CONSPIRACIES (London, 1873). This has been much relied on in the preparation of this article.

A scholarly account of the early historical development of Conspiracy has just been published as one of the Cambridge Studies in English Legal History, by P. H. WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (1921), reviewed in 35 HARV. L. REV. 353.

[2] "The offence of conspiracy," says Mr. Sergeant Talfourd, "is more difficult to be ascertained precisely than any other for which indictment lies; and is, indeed, rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law." Talfourd's edition of DICKINSON'S QUARTER SESSIONS, p. 200 (quoted by Wharton in 3 CRIMINAL LAW, 6 ed., p. 47, note (d). "The law of conspiracy is certainly in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." C. J. Gibson in Mifflin *v.* Commonwealth, 5 Watts & S. (Pa.) 461 (1843).

for their decisions is nothing short of a misfortune. It would seem, therefore, of transcendent importance that judges and legal scholars should go to the heart of this matter, and, with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.

I

The origin of the crime of conspiracy goes back to the very early pages of the history of our common law. Apparently it grew out of the effort of reformers to correct the abuses of ancient criminal procedure. During the thirteenth century, according to Bracton,[3] there were two modes of commencing prosecution for felonies — the one, by way of private appeal, generally involving trial by battle, and the other by way of public inquest before what later developed into the grand jury. False appeal was in a measure guarded against by the personal liabilities of the appellor; if the appellor were vanquished in the battle by which the truth of the accusation was tried, he was, in the words of Bracton, "committed to gaol, to be punished as a calumniator, but he shall not lose his life nor a limb, although according to the law he is liable to retaliation." [4] Furthermore, the vanquished was liable to a pecuniary penalty. "But upon the duel being finished a penalty of sixty shillings shall be imposed upon the vanquished party as a recreant, and besides he shall lose the law of the land (legem terrae amittet)." [5]

Nevertheless, abuses sprang up; children under twelve, who could not be outlawed and against whom no damages could be recovered, were sometimes incited to bring the appeal. The newer procedure of "indictment upon common report" by a grand jury lent itself to still greater abuse; one could bring to the jury false reports, and thus perhaps accomplish the downfall of his enemy,

---

[3] BRACTON: DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, f. 143. Compare GLANVILLE: DE LEGIBUS, bk. 14, ch. 1. For the brief survey of the criminal procedure of this period, see 1 STEPHEN, HISTORY OF CRIMINAL LAW, ch. 8; 1 PIKE, HISTORY OF CRIME, ch. 2.

[4] BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, f. 137.

[5] GLANVILLE, DE LEGIBUS, bk. 2, ch. 3. See also 2 POLLOCK & MAITLAND, HISTORY OF THE ENGLISH LAW, 457, 538.

without incurring the personal risk dependent upon the outcome of the trial by battle. It soon became evident that measures must be taken to correct such practices. For this purpose there was passed in 1285 the statute of 13 Edw. I, c. 12, to the following effect:

"Forasmuch as many, through Malice intending to grieve other, do procure false Appeals to be made of Homicides and other Felonies by Appellors, having nothing wherewith to make Satisfaction to the King for their false Appeal, nor to the Parties appealed for their Damages; it is ordained, That when any, so appealed of Felony surmised upon him, doth acquit himself in the King's Court in Due Manner, either at the Suit of the Appellor, or of our Lord the King, the Justices, before whom such Appeal shall be heard and determined, shall punish the Appellor by one year's Imprisonment; and such Appellors shall nevertheless restore to the Parties appealed their Damages, according to the Discretion of the Justices, having respect to the Imprisonment or Arrestment that the Party appealed hath sustained, by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise: and shall nevertheless make a grievous Fine unto the King. . . ."

Other statutes were passed allowing recovery by writ out of chancery,[6] and by inquest without writ.[7] This series of statutes culminated in the famous Third Ordinance of Conspirators, 33 Edw. I, passed in 1304, which in certain respects summed up the pre-existing law and gave a precise definition of conspiracy:

---

[6] First Ordinance of Conspirators, TOMLIN'S STAT. AT L., 20 EDW. I, p. 399. "Our Lord the King [by] *Gilbert de Roubery*, Clerk of his Council, hath commanded that who ever will complain of Conspirators, Inventors and Maintainers of false quarrels and their Abettors and Supporters and having Part therein, and Brokers of Debates, [that Persons so grieved and complaining shall come to the Chief Justices of our Lord the King, and shall have a Writ of them, under their Seals, to attach such Offenders, to answer to the Parties grieved so complaining before the aforesaid Justices; and such shall be the Writ made for them]. . . . And if any be thereof convicted at the Suit of such Complainants, he shall be imprisoned till he hath made Satisfaction to the Party grieved, and shall also pay a grievous Fine to the King."

[7] Second Ordinance of Conspirators, 28 EDW. I, c. 10 (1300). "In regard to Conspirators, false Informers, and evil Procurers of Dozens, Assises, Inquests and Juries, the King hath ordained Remedy for the Plaintiffs by a Writ out of the Chancery. And notwithstanding, he willeth that his Justices of the one Bench and of the other, and Justices assigned to take Assises, when they come into the Country to do their Office, shall, upon every Plaint made unto them, award Inquests thereupon without Writ, and without Delay, and shall do Right unto the Plaintiffs."

"Conspirators be they that do confeder or bind themselves by Oath, Covenant, or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite, or cause to be indited [or falsely to acquit people] or falsely to move or maintain Pleas; and also such as cause Children within Age to appeal Men of Felony, whereby they are imprisoned and sore grieved; and such as retain Men with their Liveries or Fees for to maintain their malicious Enterprises; [and to suppress the truth] as well the Takers as the Givers. And Stewards and Bailiffs of great Lords, which, by their Seignory, Office, or Power, undertake to maintain or support [Quarrels, Pleas, or Debates] [for other Matters] than such as touch the Estate of their Lords or themselves.

"[This Ordinance and final Definition of Conspirators was made and finally accorded by the King and his Council in his Parliament the thirty-third Year of his Reign. . . .]"

Finally, the Statute of 4 Edw. III, c. 11 (1330), made conspiracy an offense open to ready prosecution, by providing that the justices of either bench or of assize in sessions "shall enquire, hear, and determine, as well at the King's Suit, as at the Suit of the Party," cases of conspiracy or maintenance "as Justices in Eyre should do if they were in the same county."

Thus, it will be seen that the offense of conspiracy did not originate as a general offense at common law, nor under Norman institutions, but in a series of statutes dating from the time of Edward I, enacted to remedy a specific abuse. The statutes themselves make clear how narrow and restricted was the early offense of conspiracy. The offense admitted of no broad common-law generalizations; it was limited to offenses against the administration of justice, and was strictly confined to the precise and definite language of the statutes. Combinations only to procure false indictments or to bring false appeals or to maintain vexatious suits could constitute conspiracies.[8]

---

[8] "The earliest meaning of conspiracy was thus a combination to carry on legal proceedings in a vexatious or improper way, and the writ of conspiracy, and the power given by the *Articuli super Chartas* to proceed without such a writ, were the forerunners of our modern actions for malicious prosecution. Originally, therefore, conspiracy was rather a particular kind of civil injury than a substantive crime, but like many other civil injuries it was also punishable on indictment, at the suit of the king, and upon a conviction the offender was liable to an extremely severe punishment which was called 'the villain judgment.'" 2 STEPHEN, HIST. OF THE CRIM. LAW, 228.

We have the record of a case decided in 1351 [9] wherein the court was called upon to decide whether the offense of conspiracy could be so broadened as to include combinations to commit acts of a generally illegal and oppressive nature. Upon a presentment of conspiracy in the Eyre of Derby grounded upon allegations that the defendants had imprisoned and generally oppressed the people, a judgment had been rendered against the defendants; and one of the defendants then sought to reverse the judgment of the lower court. Justice Shardelowe, pressed to brand the defendant's conduct as a conspiracy, stoutly refused; and, in spite of the arguments of counsel, reversed the former decision, partly because no specific year or day or place had been named in the presentment, and partly "because the principal matter of the conspiracy alleged is not conspiracy, but rather damage and oppression of the people." Although between the reigns of Edward III and Elizabeth a number of statutes were passed to suppress combinations for various specific purposes, such as treasonable designs, breaches of the peace, raising prices, and the like, yet prior to the seventeenth century there seems to have been no mention of any combination or confederacy having been held criminal under the common law except the crime of conspiracy as defined by the Ordinance of 1305.[10]

According to the older notions, the crime of conspiracy for procuring false indictments was not complete until the person falsely accused had been actually indicted and acquitted.[11] Nothing short of an acquittal following an indictment would do.[12] This seems to

[9] Anon., Year Book, 24 EDW. III, f. 75, pl. 99.

[10] It is to be noted, however, that by the early part of the sixteenth century the courts had developed a common-law "Action upon the Case for a Conspiracy" for damages for cases of procuring false indictments where the facts would not strictly support a case under the Conspiracy Writs, as for example, where a single person had procured a false indictment. See FITZHERBERT, NATURA BREVIUM, 114 D. See also the case of Marsh *v.* Vauhan, Cro. Eliz. 701. In that case two had been indicted for conspiracy, and one was found guilty and the other not. The court thereupon quashed the indictment; and the opinion of the whole court was "that a writ of conspiracy lies not, nor is maintainable upon this verdict. But an action upon the case, in nature of a conspiracy, might have been brought in this case."

[11] Where the conspiracy was for maintenance, however, it had been held as early as 1354 that the defendants might be held to answer for the conspiracy each to maintain the other though no suit had actually been commenced. See Anon., 27 Ass., f. 138 b, pl. 44.

[12] "A Writ of Conspiracy lieth where two, three or more persons of malice and covin do conspire and devise to indict any person falsely, and afterwards he who is so

have remained the well-settled law for some three centuries; it was not until the close of the sixteenth century that the courts began to relax the strictness with which they had always limited the crime of conspiracy. During the reign of James I, Chief Justice Popham recalled a case, decided in 1574, wherein the justices had suggested that a common-law indictment for conspiracy might be allowed against false accusers even though no indictment upon the false charge had been found by the grand jury.[13] Such a doctrine was authoritatively established by the Court of Star Chamber in the famous *Poulterers' Case*,[14] decided in 1611. Thus was taken the first step in the long process by which the early rigidly defined crime of conspiracy was, through judicial, analogical extension, gradually expanded into the vague and uncertain doctrine which we know to-day.

In the *Poulterers' Case*, the defendant poulterers had confederated to bring against one, Stone, a false accusation of robbery; but Stone was so manifestly innocent of the crime charged that the grand jury refused to indict him. As a defense to the action for damages subsequently brought by Stone against his false accusers, it was argued that since he had never been indicted or acquitted, no recovery could be had; "because no writ of conspiracy for the party grieved, or indictment or other suit for the King lies, but where the party grieved is indicted, and *legitimo modo acquietatus*, as the books are F. N. B. 114b; 6 E. 3, 41a; 24 E. 3, 34b; 43 E. 3. Conspiracy 11; 27 Ass., p. 59; 19 H. 6, 28; 21 H. 6, 26; 9.E. 4, 12, &c." But the Court of Star Chamber squarely decided to the contrary, citing certain early notes, and definitely held that, as in conspiracies for maintenance, the confederating together constituted the gist of the offense rather than the false indictment and subsequent acquittal. From the doctrine announced by this

indicted is acquitted; now he shall have this Writ of Conspiracy against them who so indicted him." FITZHERBERT, NATURA BREVIUM, 114 D. Coke defines conspiracy as "a consultation and agreement between two or more to appeale or indict an innocent falsely and maliciously of felony, whom accordingly they cause to be indicted and appealed; and afterward the party is lawfully acquitted by the verdict of twelve men." (3 INST. 142–143.) So, Hudson, in his treatise on the Star Chamber (2 COLL. JURID. 104, 105) says in regard to conspiracy: "But when the party is indicted, and not *legitimo modo acquietatus*, then can no conspiracy lie, as it was adjudged in *Daniel Wright's* case." See also Sherington *v.* Ward, Cro. Eliz. 724.

[13] Sydenham *v.* Keilaway, Cro. Jac. 7.

[14] 9 Coke 55 b.

decision, it was an easy step to the very general doctrine that since the gist of the crime is the conspiracy, no other overt act is necessary;[15] and this came to be the well-acknowledged law of criminal conspiracy.[16] In the ancient phraseology, it was not necessary to show that anything had been "put in ure";[17] the mere conspiracy alone was held to constitute the gist of the offense and to be therefore indictable. There seems to be no doubt but that the courts in adopting this doctrine followed a sound instinct; and the principle, thus early decided, has come to be a universal and well-settled doctrine of the modern law of conspiracy. There is nothing in the doctrine out of accord with the well-recognized principle of criminal law that without some overt act no one can be convicted of a common-law crime, no matter how black his intent may have been. For the conspiring together itself constitutes an overt act which may well furnish the basis of criminal liability. Once given some overt act, the criminal law does not necessarily require the fulfillment of the defendant's designs or the completion of his intended actions before liability attaches. The entire law of attempts bears witness to the contrary.

Some writers, indeed, have viewed the law of criminal conspiracy as an outgrowth of the larger law of criminal attempts.[18] That the two have many features in common and are based very largely on the same general underlying principles, cannot be gainsaid. Nevertheless, the two are not to-day the same; every criminal conspiracy is not an attempt. One may become guilty of conspiracy long before his act has come so dangerously near to completion as to make him criminally liable for the attempted crime.

[15] The growth of this doctrine may be traced in the following cases: Rex *v.* Kimberty, 1 Lev. 62 (1663); Rex *v.* Armstrong, 1 Ventr. 304 (1678); Rex *v.* Best, 2 Ld. Raym. 1167, 6 Mod. 185 (1705); Rex *v.* Kinnersley & Moore, 1 Stra. 193 (1719).

[16] See, for example, 1 HAWKINS, PLEAS OF THE CROWN, c. 72, § 2. As Hawkins points out, a distinction was drawn between a formal action based upon the writ of conspiracy and "an action on the case in the nature of such writ."

[17] Anon., 27 Ass., f. 138 b, pl. 44 (1354).

[18] See, for example, WRIGHT, LAW OF CONSPIRACY, 36, 62. Stephen also comments on the analogy between the law of conspiracy and that of attempts. 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 227. Bishop goes so far as to say: "The act of conspiring, and the specific intent to accomplish what constitutes a substantive crime, are in combination a criminal attempt, and it is the professional usage to term it conspiracy. It follows the same rules, and is subject to the same limitations, as other attempts." 2 BISHOP, NEW CRIM. LAW, 8 ed., § 191(2), p. 107. "It is not called in the books 'attempt,' but it is such in nature and effect." (1 *Ibid.*, § 592.)

For instance, as Justice Holmes has pointed out, the mere agreement to murder a man fifty miles away could not possibly constitute an attempt, but might easily be indictable as a conspiracy.[19]

During the seventeenth century the courts took a second step in extending and broadening the limits of the crime of conspiracy of even greater importance than the one just described. Prior to this century, the crime had been confined very strictly to combinations to defeat the just administration of the law, such as the procuring of false indictments, embracery, and maintenance. During the seventeenth century the courts began to extend the offense so as to cover combinations to commit all crimes of whatsoever nature, misdemeanors as well as felonies.[20] This was a bold extension indeed. It was due in part to the abolition of the Court of Star Chamber, which cast upon the Court of King's Bench the duty, hitherto assumed by the Star Chamber, of dealing with misdemeanors; and the judges of King's Bench, groping their way through unfamiliar paths, tried new legal adventures. Perhaps it was due even more largely to the character of the period or stage through which the law was passing. People had felt the injustice of the hard, narrow formalism, the rigidity and unjust technicalities of the "Strict Law" period of the fourteenth, fifteenth, and sixteenth centuries. During the seventeenth and eighteenth centuries a reaction set in, in favor of a broader, more moral law. Fine-spun intricacies of pleading and the technicalities of formal writs began to give way before questions of right and wrong. It was a period when the courts were busy infusing morals into the law; and inevitably, as part of this process of infusion, there came to be a blurring of the line of distinction between law and morals, and a consequent confusion of the two. In 1616, in *Bagg's Case*,[21] the Court of King's Bench formally "resolved, that to this Court of King's Bench belongs authority, not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of peace, or oppression of the subjects, or to the raising of faction, controversy, debate, or to any

[19] Hyde *v.* United States, 225 U. S. 347, 388 (1912).

[20] The courts of this period even went so far as to hold criminal a combination to accuse one of an offense cognizable only in the spiritual courts. See Rex *v.* Timberley & Childe, 1 Sid. 68, 1 Keb. 203, 254 (1663).

[21] 11 Co. Rep. 93 b, 98 a (1616).

manner of misgovernment; so that no wrong or injury, either public or private, can be done, but that it shall be (here) reformed or punished by due course of law." So in *Rex* v. *Sidney*,[22] decided in 1664, twenty-four years after the abolition of the Court of Star Chamber, the Court of King's Bench, addressing the defendant indicted for several misdemeanors, "which were a great scandal of Christianity," reiterated much the same doctrine, declaring that "although there was not now a Star Chamber, still they would have him know that this court is *custos morum* of all the subjects of the King." Even as late as Lord Mansfield's time, such pretensions had not been entirely abandoned. In the case of *Jones* v. *Randall*,[23] Lord Mansfield re-echoed good seventeenth-century doctrine when he said: "Whatever is *contra bonos mores et decorum*, the principles of our law prohibit, and the King's Court, as the general censor and guardian of the public manners, is bound to restrain and punish."

Hence, during the latter part of the seventeenth century, when the tendency of the courts was in the direction of undertaking to punish acts immoral as well as those violative of express law, it was not strange that the idea should gain currency on many sides that courts should similarly undertake to punish conspiracies to commit immoral as well as those to commit illegal acts. The idea that a combination may be criminal, although its object would not be strictly criminal apart from the combination, first began to take articulate form towards the close of the seventeenth century in the arguments of counsel. Nevertheless, the judges stoutly refused to follow such suggestions. The doctrine seems to have been squarely repudiated by Lord Holt in 1704;[24] in fact, during the whole of the seventeenth century, when the courts were stretching and liberalizing legal principles and doctrines to extremely wide limits, there seems to be no evidence of a single case (apart from the doubtful exception of *Starling's Case*[25]) where the courts

[22] 1 Sid. 168 (1664). [23] Lofft, 383 (1774).

[24] Daniell's Case, 6 Mod. 99, 1 Salk. 380 (1704).

[25] Rex *v.* Starling, 1 Sid. 174 (1665). But apparently even in this case the defendants were convicted because of the criminal nature of what they were conspiring to do, *i. e.*, to interfere with the farming of the public revenues. As Lord Holt said in Reg. *v.* Daniell, 6 Mod. 99, 100, "the case of Starling was directly of a publick nature, and levelled at the government; and the gist of the offense was its influence on the publick. . . ."

allowed a conspiracy conviction for a combination to commit an act not itself criminal.[26]

After the seventeenth century, when the courts receded from their extreme seventeenth-century pretensions, the indefensible doctrine suggested by arguing counsel might well have been forgotten had it not been for an unfortunately ambiguous statement made by Hawkins in his *Pleas of the Crown*, published in 1716. Concerning the crime of conspiracy, Hawkins said: "There can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." [27]

What did Hawkins mean by "wrongfully"? If he meant by criminal means it was exceedingly unfortunate that he did not choose terms confined to such a meaning; if he meant by tortious or merely immoral means, the authorities which he cites in support of his statement by no means sustain him,[28] and almost his only support is to be found in the loose *dicta* of seventeenth-century courts and in the arguments of counsel. Nevertheless, Hawkins' erroneous statement lived on, partly because of the acknowledged authority of the writer, partly because of the seventeenth and eighteenth century confusion of law and morals, partly because of the very ambiguity of the statement which rendered it the less liable to be challenged and the more difficult to disprove. In the

---

[26] WRIGHT, LAW OF CONSPIRACY, 67.

[27] HAWKINS, PLEAS OF THE CROWN, 6 ed., bk. 1, c. 72, § 2, p. 348.

[28] Hawkins cites in support of his statement only four cases and two notes. These are Rex *v.* Timberley, 1 Sid. 68, 1 Keb. 254, 1 Lev. 62; The Poulterers' Case, 9 Coke 55 b; Reg. *v.* Best, 6 Mod. 185; and Starling's Case, 1 Lev. 125, 126, 1 Sid. 174; 1 Keb. 650; and the two brief notes in 27 Ass. 44 (6) and 2 Rol. Ab. 77 pl. 2, 3. (Two of Hawkins' citations are erroneous. For 1 Keble 350, he evidently means 1 Keble 650, and for 1 Mod. 185, he evidently means 6 Mod. 185). With the possible exception of Starling's Case, not one of these cases or notes supports Hawkins' statement. All except Starling's Case fall within the terms of the Ordinances of Conspirators or are conspiracies to achieve some criminal object, and therefore prove nothing as to the criminality at common law of a "confederacy wrongfully to prejudice a third person." Rex *v.* Timberley and The Poulterers' Case concern conspiracies to procure false indictments; Reg *v.* Best concerns a conspiracy falsely to charge another with being the father of a bastard in order to extort money. Even the two notes do not support Hawkins' statement. Hawkins' only possible support is Starling's Case; and a careful reading of that case would seem to prove exactly the opposite of Hawkins' statement. As Wright states (LAW OF CRIMINAL CONSPIRACY, p. 38): "[Starling's Case] appears to amount to a decision that a combination to impoverish a man (other than the king) by means not criminal in themselves, is not criminal."

course of time, the statement came to be regarded as authoritative and thus furnished the foundation of later *dicta* and judicial opinion.

From this time on, the well-acknowledged formula that the conspiracy constitutes the gist of the offense came to be infused with quite a new meaning in order to support the statement of Hawkins interpreted in its erroneous sense. In the case of *Rex* v. *Edwards*,[29] decided in 1724, eight years after the publication of Hawkins' book, certain defendants were indicted for having entered into a conspiracy to marry off a pauper woman to the inhabitant of another parish so that their own parish might escape further liability for her support. The counsel indulged in the usual arguments, the defense insisting that no one could be convicted for conspiring to achieve something not a crime, and the prosecution, quite regardless of any distinction between law and morals, arguing that "a conspiracy to do a lawful act, if it be for a bad end, is a good foundation for an indictment." The decision, it is true, was correctly rendered for the defendant; but the court by way of *dictum* echoed the loose ideas of Hawkins, stating that a "bare conspiracy to do a lawful act to an unlawful end is a crime, though no act be done in consequence thereof," citing as its only authority *Reg.* v. *Best*,[30] which in reality lends no support to the doctrine that one can be convicted for conspiring to commit some illegal but non-criminal act.

Another case often quoted in support of the Hawkins doctrine is *Rex* v. *Journeymen Tailors*,[31] decided in 1721, where certain journeymen tailors were indicted and found guilty of a conspiracy to raise their wages. In the course of the opinion the court is reported as saying that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of *The Tubwomen* v. *The Brewers of London*." A careful search of the authorities has failed to reveal the existence of any such case as the one cited. Those who rely upon *Rex* v. *Journeymen Tailors* as a support for the Hawkins doctrine forget that at the time of the decision there was in force in England a

[29] 8 Mod. 320 (1724).
[30] 6 Mod. 185; 2 Ld. Ray. 1167 (1705).
[31] 8 Mod. 10 (1721).

statute,[32] passed the preceding year, which expressly made it criminal for journeymen tailors to enter into any agreement "for advancing their Wages or for lessening their usual Hours of Work"; under this statute and under 2 & 3 Edw. 6, c. 15, the defendants' conduct would have been criminal quite apart from any conspiracy doctrine.

Apart from the fraud cases, where the Hawkins doctrine crept into the decisions during the latter part of the seventeenth and the early eighteenth centuries, and from which it has never been eliminated, the vast majority of actual decisions still continued to adhere to the long-established law that there could be no conspiracy conviction unless the object conspired for or the means used was criminal. For instance, in the much-quoted case of *Rex* v. *Turner*,[33] decided by the King's Bench in 1811, an indictment was brought for conspiracy for "unlawfully and wickedly devising and intending to injure, oppress and aggrieve" a certain property-owner by "unlawfully and wickedly" conspiring to poach upon his preserve for hares with "divers bludgeons and other offensive weapons," and for breaking into the said preserve and "carrying into execution their unlawful and wicked purposes." The prosecution relied on the now familiar arguments, quoting in support of their position both Hawkins and *Rex* v. *Edwards*. But Lord Ellenborough would have none of such arguments, and made absolute a rule to arrest the judgment upon a verdict of guilty, saying: "I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment."

Nevertheless, in spite of square decisions, such as *Rex* v. *Turner*, holding that combinations to commit non-criminal acts cannot apart from statute themselves be criminal, the seventeenth-century ideas persisted. Now and again in arguments of counsel, in *dicta*, in epigrammatic statements, in occasional actual decisions,

---

[32] 7 GEO. I, c. 13, p. 403 (1720). This statute fixed the daily hours of work for journeymen tailors as running from six o'clock in the morning to eight o'clock at night; the wages were fixed from March 25 to June 24 at "any sum not exceeding Two Shillings per Diem, and for the Rest of the Year One Shilling and Eight Pence per Diem."

[33] 13 East, 228 (1811).

the ghost of Hawkins still walked. Hawkins' language was literally adopted and transcribed into Burn's *Justice*,[34] which was first published in 1755 and which, in succeeding editions, was so widely read during the eighteenth and nineteenth centuries. It was also copied into Wilson's *Works*.[35] Chitty, in his *Criminal Law*,[36] again repeats the Hawkins formula, saying: "In a word, all confederacies wrongfully to prejudice another are misdemeanors at common law, whether the intention is to injure his property, his person, or his character." And in Christian's edition of Blackstone's *Commentaries*,[37] it is said: "Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy." A reincarnation of the doctrine took form in Lord Denman's famous epigram that a conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means." [38]

Like the magic jingle in some fairy tale, through whose potency the bewitched adventurer is delivered from all his troubles, this famous formula was seized upon by judges laboring bewildered through the mazes of the conspiracy cases as a ready solution for all their difficulties. It would fit any conspiracy case whatever; it was, so to speak, ready to wear, and obviated the necessity of carefully thinking through or correctly analyzing the doctrine of conspiracy. As a consequence, judges gave to it the widest use. In spite of the fact that Lord Denman himself later apparently repudiated it,[39] it came to be considered as a sacred and final dispensation of the law. The real difficulty was that it contained the same kind of ambiguity as did Hawkins' statement in the preceding century; "unlawful" might be interpreted so as to mean "criminal," in which case it correctly stated the law according to the great majority of decisions; or it might

[34] 1 RICHARD BURN, THE JUSTICE OF THE PEACE, 4 ed., p. 276.

[35] 3 JAMES WILSON, WORKS, 118.

[36] Vol. 3, 1 ed., p. 1139.

[37] Vol. 4, p. 136 (Christian's note 4).

[38] See Jones' Case, 4 B. & Ad. 345, 349 (1832). Wright, in speaking of this famous statement says (LAW OF CRIM. CONSPIRACY, p. 63): "That antithesis was invented by Lord Denman . . . to express the very opposite of that for which it is sometimes cited." Compare Rex *v.* Seward, 1 A. & E. 706, 711, 713 (1834).

[39] In the subsequent case of Reg. *v.* Peck, 9 A. & E. 686, 690 (1839) Lord Denman said in reply to counsel quoting his own words to him: "I do not think the antithesis very correct."

without doing the least violence to the language, be interpreted to include "tortious" as well as "criminal," in which case eighteenth-century misconceptions would be still further perpetuated. Unfortunately, it was in the latter sense that it was too often interpreted, particularly in the loose *dicta* of the conspiracy cases.

The truth of the matter is that judges found the Hawkins conception of criminal conspiracy entirely too convenient an instrument for enforcing their own individual notions of justice to be lightly discarded. It enabled judges to punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable, even though the actual deeds committed constituted of themselves no crime, either by statute or by common law. And in cases where the actual deeds were of doubtful criminality, it saved the judges from the often embarrassing necessity of having to spell out the crime.

Illustrations of this among the nineteenth-century cases are not difficult to find. Thus, in *Rex* v. *Bykerdike*,[40] decided in 1832, the defendants were indicted for conspiracy for threatening a strike among the employees in a certain colliery unless certain other employees should be discharged. The action was brought after the Combinations Act of 1800 [41] had been repealed; and it was popularly supposed that the effect of the Acts of 1824 [42] and 1825 [43] had been to free labor unions from the charge of criminality which had attached to them under the former Combinations Act. Quite possibly in *Rex* v. *Bykerdyke*, the separate acts of the defendants, apart from conspiracy, might have been held to be criminal under the very ambiguous words of the Act of 1825, which prohibited in trade disputes a "molesting or in any way obstructing another." But the point is that the judge apparently never took the trouble to define, nor so far as appears from the report, to inquire into the precise meaning of these ambiguous words; instead he held the defendants as criminals under a vague conspiracy doctrine without any discussion or indication as to whether under the Act of 1825 criminality attached to the means they used or the object they sought, or both, or neither. The jury were informed simply that "a conspiracy to procure the discharge of any of the work-

[40] 1 Mood. & Rob. 179 (1832).
[41] 40 GEO. III, c. 106.
[42] 5 GEO. IV, c. 95.
[43] 6 GEO. IV, c. 129.

men would support the indictment. . . ." [44] The case illustrates, not necessarily a faulty decision, but the obvious convenience and consequent danger of a doctrine which will allow a judge to enforce by criminal punishment his individual ideas of what makes for or against the social welfare.

Similar illustrations are to be found among the American cases. In *State* v. *Donaldson*,[45] several employees had been indicted upon a conspiracy charge for notifying their employer that unless he discharged certain other employees, they would quit his employment. After a careful examination of the case, the court could find nothing criminal in the separate acts committed by the defendants. Nevertheless, relying partly upon *Rex* v. *Bykerdyke*,[46] and one other English case,[47] it refused to quash the indictment; and it proceeded to brand the defendants as criminals because of their participation in a combination which it regarded as illegal and criminal by reason of its generally oppressive nature. The court said: [48] "It may safely be said, nevertheless, that a combination will be an indictable conspiracy . . . where the confederacy, having no lawful aim, tends simply to the oppression of individuals." When and under what principles action which otherwise constitutes no violation of the criminal law may be said to be criminal because it "tends to the oppression of individuals" is a question upon which the court remained discreetly silent. The conduct of those who go on strike to compel their employer to discharge other non-union employees is clearly not criminal apart from any conspiracy doctrine. Indeed, in the majority of states it is held not even tortious.[49] Acts "tending to the oppression of

[44] The Judge's only reference to the Act of 1825 was the last sentence of the opinion in which he said that, "the statute never meant to empower workmen to meet and combine for the purpose of dictating to the master whom he should employ, and that this compulsion was clearly illegal." But this summary reference leaves entirely undecided whether the criminality lay in the combination, or in some "molesting" of employees, or in some "obstructing" of the employer.

[45] 32 N. J. L. 151 (1867).

[46] The court quite disregarded or overlooked the fact that Rex *v.* Bykerdyke was decided under the English Act of 1825 which made criminal the "molesting or in any way obstructing another" in a trade dispute, — a statute which of course was not in force in New Jersey.

[47] See *Ibid.*, 156, 157. [48] *Ibid.*, p. 154.

[49] See, for instance, Cohn & Roth Electric Co. *v.* Bricklayers' Union, 92 Conn. 161, 101 Atl. 659 (1917); Jetton-Dekle Lumber Co. *v.* Mather, 53 Fla. 969, 43 So. 590 (1907);

individuals" committed in other fields of trade competition have often been held entirely justifiable.[50] Yet in *State* v. *Donaldson*, Chief Justice Beasley held that defendants joining in such a strike were actual criminals.[51] Perhaps no case could better illustrate the vague menace of a criminal-law doctrine by means of which conduct usually regarded as perfectly lawful, and nowhere, apart from the conspiracy doctrine, regarded as criminal, can be turned by a judge who happens to be out of sympathy with the defendants' efforts into a criminal offense.

In *State* v. *Burnham*,[52] decided in 1844, a New Hampshire Court went so far as to declare that a combination to commit a merely immoral act might constitute a criminal conspiracy. Justice Gilchrist said:

"An act may be immoral without being indictable, where the isolated acts of an individual are not so injurious to society as to require the intervention of the law. But when immoral acts are committed by numbers, in furtherance of a common object, and with the advantages and strength which determination and union impart to them, they assume the grave importance of a conspiracy, and the peace and order of society require their repression. . . . When it is said in the books that the means must be unlawful, it is not to be understood that those means must amount to indictable offences, in order to make the offence of conspiracy

---

Kemp *v.* Division, No. 241, 255 Ill. 213, 99 N. E. 389 (1912); Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367 (1895); Gray *v.* Bldg. Trades Council, 91 Minn. 171, 185, 97 N. W. 663 (1903); State *v.* Employers of Labor, 102 Neb. 768, 774, 169 N. W. 768 (1918); National Protective Ass'n *v.* Cumming, 170 N. Y. 315, 63 N. E. 369 (1902); Kissam *v.* United States Printing Co. 199 N. Y. 76, 92 N. E. 214 (1910); Bossert *v.* Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); State *v.* Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904); Roddy *v.* United Mine Workers, 41 Okla. 621, 139 Pac. 126 (1914); Sheehan *v.* Levy, 215 S. W. 229 (Tex. Civ. App., 1919). *Contra:* Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011 (1899), and numerous other Massachusetts cases; Ruddy *v.* Plumbers, 79 N. J. L. 467, 75 Atl. 742 (1910); Bausbach *v.* Reiff, 244 Pa. 559, 91 Atl. 224 (1914); State *v.* Dyer, 67 Vt. 690, 32 Atl. 814 (1894).

[50] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25; Macauley Bros. *v.* Tierney, 19 R. I. 255, 33 Atl. 1 (1895); Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 55 N. W. 1119 (1893).

[51] In the later New Jersey case of Jersey City Printing Co. *v.* Cassidy, 63 N. J. Eq. 759, 762, 53 Atl. 230 (1902), the Court said: "The doctrine of the old cases, of which we have in New Jersey an interesting example in *State* v. *Donaldson* . . . which placed the employee, when acting in combination with his fellow-workmen, at a tremendous disadvantage as compared with his employer, I think may be regarded as entirely exploded."

[52] 15 N. H. 396, 402, 403 (1844).

complete. It will be enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offence consist."

Such language sounds more as though it had been written by the Court of Star Chamber in the seventeenth century than by a judge in liberty-loving America more than half a century after the American Revolution. Yet in spite of the fact that the doctrine of *State* v. *Burnham* was apparently directly overruled in the later New Hampshire case of *State* v. *Straw*,[53] *State* v. *Burnham* is still quoted to-day in support of the Hawkins doctrine.[54] Thus, like an underground stream that ever keeps coming to the surface, the doctrine, constantly reiterated in the loose *dicta* of courts and the statements of text-writers, has kept appearing and reappearing ever since Hawkins' time, in spite of the fact that, apart from fraud cases, so far as actual decisions are concerned the doctrine finds almost no support.[55]

II

Thus far the doctrine that a combination to commit a non-criminal act may constitute a criminal conspiracy has been examined solely from the historical viewpoint; and in the light of history the doctrine seems so manifestly founded upon misconceptions and erroneous applications of ambiguous statements that it is difficult to support. But many wholesome and salutary doctrines of the law have sprung up through misunderstandings of past decisions or without any historical basis whatsoever. To show the historical illegitimacy of a legal doctrine does not disprove its present right of existence or its usefulness. Quite apart from historical considerations, is the doctrine logically sound? Will it bear the test of careful analytical scrutiny?

An analytical examination of the doctrine raises new difficulties. If the object sought by a combination is in no way criminal, and if the means utilized are in no way criminal, just wherein lies

---

[53] 42 N. H. 393, 396 (5) (1861). The court in this case squarely held that a combination to commit a civil trespass did not constitute a criminal conspiracy.

[54] See, for example, 8 CYC. 624, note 19; 12 C. J. 548, note 48; 2 BISHOP, NEW CRIM. LAW, 8 ed., § 181, note 2 (p. 103); 3 WHARTON, CRIM. LAW, 6 ed., 81, note (l), § 2326.

[55] See *infra*, p. 422 *et seq.*

any criminality? The mere act of combining can surely not be criminal, where no criminal end is sought nor criminal means used. It is no crime to combine to form a social club, a church, a political association. As was said by Serjeant Talfourd, in discussing the crime of conspiracy: [56]

"It is not easy to understand on what principle conspiracies have been holden indictable where neither the end nor the means are, in themselves, regarded by the law as criminal, however reprehensible in point of morals. Mere concert is not in itself a crime; for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal.[57] If, then, there be no indictable offence in the object; no indictable offence in the means; and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another, the evidence of the means; while, at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless."

The answer which naturally suggests itself to such arguments is that just as in chemistry the combination of A, B, and C, all non-poisonous substances, may form a new compound, D, poisonous and quite different from the elements of which it is composed, so in criminal law separate acts, each alone perfectly lawful, may, when combined together, constitute such an anti-social effect that the actors' conduct as a whole becomes criminal. The mere act of crooking a finger on the trigger of a gun is not of itself necessarily unlawful; neither is there necessarily any criminality in the mere act of pointing a gun, nor in the act of loading one. Yet when all these acts are combined, in certain circumstances the resultant effect may constitute a crime. So, a single man blowing a whistle on the streets at night might constitute no nuisance; but if a hundred men did identically the same thing in combination, they might easily be indictable for creating a public nuisance.

But such an answer does not explain away all of the difficulty.

[56] WM. DICKINSON, A PRACTICAL GUIDE TO THE QUARTER SESSIONS, 3 ed. by T. N. Talfourd (1829), p. 201.

[57] R. *v.* Murray, tried before Abbot, C. J., at Guildhall, 1823; cited in 1 BURN, JUSTICE OF THE PEACE, 30 ed., p. 976.

It leaves unexplained how it is that precisely the same effect which is perfectly lawful when procured by one becomes criminal when procured by two. When closely analyzed, criminality consists, not in detached separate acts, but in the anti-social *effect* of acts.[58] For instance, in the gun case above suggested, murder is committed, not where the finger is crooked upon the trigger, but where the anti-social *effect* of the act takes place, *i. e.*, where the bullet hits the victim's body;[59] and it is this particular anti-social *effect* which is labeled as the crime of murder. To convict a criminal defendant it is not necessary to prove that he was ever physically present or that he acted within the state; it is sufficient to show that the anti-social *effect* of his acts, committed elsewhere with *mens rea*, operated within the state.[60] If criminality then consists, not in mere acts, but in the anti-social effect of acts, must not criminality be measured by the nature of the effect,[61] and not by the character or number of those whose acts produce that effect? For instance, in the nuisance case suggested above, if a single man arranged by steam to blow the same hundred whistles on the street at night, no one would suppose that he would not be indictable for the nuisance. If criminality is to be measured by the character of the *effect* of the defendant's acts, how can it make any possible difference as to criminality whether the identical effect is procured by one or two or a hundred? How then can it be said that if a single individual procures a certain effect by certain means he is not a criminal, but if a combination of individuals procure the self-same effect by the self-same means, they are all criminals? Is such a doctrine logically defensible? [62]

---

[58] Acts being defined, in the words of Mr. Holmes, as voluntary "muscular contractions." — HOLMES, THE COMMON LAW, p. 54.

[59] See, for example, United States *v.* Davis, 2 Sumn. (U. S.) 482 (1837); State *v.* Hall, 114 N. C. 909, 19 S. E. 602 (1894).

[60] Of course it is necessary also to show that the anti-social effect is such as constitutes, under the law of the prosecuting state, a criminal offense.

[61] If, for example, after the defendant had fired at his victim with full intent to kill him, the bullet had been deflected perhaps by another bullet, and the victim not hit, there would have been no crime of murder, although every single act and motive of the defendant would have been precisely the same.

[62] Adherents of the Hawkins doctrine sometimes seek to defend the logic of the doctrine by its analogy to the offenses of routs and riots. Routs and riots are crimes which by common law require the concurrence of three or more persons. No matter how great a tumult a single person may make, he cannot be indicted for a rout or a

III

But the law, which after all exists primarily to achieve justice and thus to promote social peace and equilibrium, must not be bound down too arbitrarily by logical or purely analytical considerations any more than by the iron grip of historical precedents and correctly traced legal genealogies. If the purpose of legal doctrines is to promote the social security and well-being, they must be examined functionally and tested by the degree of protection which they afford to social and to individual interests or rights.

A law which protects must be a predicable law; indeed one of the most essential attributes of all law is predicability. It is perhaps this more than any other factor which makes justice according to law preferable to justice without law, as found for example in legislative or executive justice.[63] The excellence of justice according to law, or judicial justice, rests upon the fact that judges are not free to render decisions based purely upon their personal predilections and peculiar dispositions, no matter how good or how wise they may be; they are bound by principles embodying the accumulated wisdom and experience of past ages, and those principles furnish a fixed standard by which citizens of the state may measure or shape their conduct and by which the course of justice can be reasonably foreseen and predicted. Once rob the law of this predicability, and the state reverts to a government by men rather than by law. No one will be secure in his or her interests

---

riot. But the analogy after all is rather superficial. Criminality, here as elsewhere, is measured by the anti-social effects of the defendants' acts; and in the inherent nature of things it is impossible for a single individual to produce the effect of a riot. In other words, a single person is not indictable for a riot, because it is inherently impossible for him to produce the anti-social effect or criminal consequence known as a riot; but as to cases of conspiracy it is in fact very frequently possible for a single individual to procure or cause identically the same criminal consequence as a combination may procure.

[63] Interesting examples of legislative justice will be found in the judicial powers exercised by American colonial legislatures and state legislatures immediately after the Revolution, such as the issue of bills of attainder, bills of pains and penalties, legislative granting of new trials, legislative divorce proceedings, insolvency proceedings, etc. See POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, 3 ed., p. 75. Legislative justice has generally been recognized as capricious, uncertain, and therefore often unjust and tyrannical, and highly susceptible to prejudice and extra-legal considerations.

or rights, for no one can foretell what interests individual judges may see fit to protect or to disregard. If the criminal law permits judges to determine criminality by their own individual standards and prejudices, we must face again the anxious fears and troubled insecurity of the old Star Chamber days; decisions will lose their predicability, and the law will obviously cease to protect.

If a legal doctrine is to be tested functionally according to the degree of security which it affords to the individual and social interests which the law was created to protect, any doctrine which tends to rob the law of its predicability, therefore, must be accounted pernicious. It is hard to imagine a doctrine which would more effectively rob the law of predicability so far as it is applicable than the one that a criminal conspiracy includes combinations to do anything against the general moral sense of the community. Under such a principle every one who acts in co-operation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law. There will be a very real danger of courts being invoked, especially during periods of reaction, to punish, as criminal, associations which for the time being are unpopular or stir up the prejudices of the social class in which the judges have for the most part been bred.

Certain of the labor cases furnish striking illustrations. For example, in the case of the *Philadelphia Cordwainers*,[64] where a group of journeymen cordwainers were tried in 1806 on an indictment for criminal conspiracy for having agreed together not to work except for higher wages, the court trying the case was unable to discover anything criminal in the object of seeking higher wages or in the means used to obtain that end. Nevertheless, at that time there prevailed among the upper classes, both in England [65]

[64] This, it is believed, was the first trial in America of wage-earners as such for trade-union conspiracy. The report of the case was printed as a pamphlet in 1806; it may be found reprinted in 3 COMMONS AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, pp. 59–248.

[65] During this time the sentiment of the upper classes in England was so hostile to trade unions that there remained in force from 1800 to 1824 the drastic Combinations Act (40 GEO. III, c. 106), which made every journeyman workman who "enters into any combination to obtain an advance of wages or to lessen or alter the hours of work" liable to imprisonment.

In America, also, during the entire first third of the nineteenth century the crimi-

and America, a bitter feeling of hostility against the working classes; the generally accepted view was that any concerted action by the workers against their employers must be because of the very nature of things inherently criminal. One is not surprised, therefore, that in the *Philadelphia Cordwainers' Case* the defendants who had been bold enough to organize a strike for higher wages were found guilty and branded as criminals; the court was enabled to achieve the desired result by resorting to the convenient doctrine flowing from Hawkins' statement of the conspiracy law.

"A combination of workmen," said the court, "to raise their wages may be considered in a two fold point of view; one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both. . . . Hawkins, the greatest authority on the criminal law, has laid it down, that a combination to[66] maintaining one another, carrying a particular object, whether true or false, is criminal." [67]

When journeymen sought to apply the same doctrine against their employers combining to depress wages, the doctrine was flexible enough to allow the courts to exercise a very broad discretion. In the case of *Commonwealth* v. *Carlisle*,[68] decided in 1821, where journeymen sought to convict certain master shoemakers for combining to depress wages, Judge Gibson, groping for some sound principle upon which to rest the conspiracy cases, felt that a combination of employers should not be held illegal if it was formed to oppose a similar combination of employees seeking

---

nal law was the accepted method for dealing with trade unions. See early cases in 3 & 4 COMMONS & GILMORE, DOCUMENTARY HISTORY.

[66] The evident omission appears in COMMONS & GILMORE.

[67] Quoted from 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, p. 233.

Compare the language used in the New York Hatters' Case of 1823. "Journeymen confederating and refusing to work, unless for certain wages, may be indicted for a conspiracy, . . . for this offence consists in the conspiracy and not in the refusal; and all conspiracies are illegal though the subject-matter of them may be lawful. . . Journeymen may each singly refuse to work, unless they receive an advance in wages, but if they refuse by preconcert or association they may be indicted and convicted of conspiracy. . . . The gist of a conspiracy is the unlawful confederation, and the offence is complete when the confederacy is made, and any act done in pursuit of it is no constituent part of the offence." Quoted from GROAT, AN INTRODUCTION TO THE STUDY OF ORGANIZED LABOR IN AMERICA, p. 38.

[68] Brightly's N. P. Rep. (Pa.) 36 (1821).

artificially to raise their wages; his conclusion was that "a combination to resist oppression, not merely supposed but real, would be perfectly innocent; for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy." [69] The court finally decided that the defendants were not guilty unless they should be proved "to have been actuated by an improper motive."

It may be that these two decisions were right or it may be they were wrong; the point is that the application of the Hawkins doctrine of criminal conspiracy rendered the law applicable to labor combinations either very unpredicable or highly unjust. Since that day some of the prejudice and much of the bitterness against labor unions has passed away. The courts have in a measure corrected their mistakes; they universally to-day declare the legality and even the social necessity under modern industrial organization of trade-union associations and organized effort on the part of employees.[70] But in spite of all, there still lurks in many minds considerable of the ancient feeling; and even to-day decisions are to be found where the courts have resorted to the same vague conspiracy doctrine in order to hold criminal the members of trade unions whose concerted conduct tended in the judge's eyes to injure the social welfare, but in whose individual conduct

[69] Brightly's N. P. Rep. (Pa.) 42 (1821).

[70] See, for instance, the recent pronouncement of the United States Supreme Court in the case of American Steel Foundries *v.* The Tri-City Central Trades Council, U. S. Sup. Ct., October Term, 1921 (decision rendered Dec. 5, 1921), where Mr. Chief Justice Taft, rendering the opinion of the court, says (at page 13): "Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

the court could find nothing criminal.[71] The consequence of such decisions is that trade-union members, forced by our competitive system to fight bitter economic battles both against non-union employees and against employers intent upon driving down the price of labor, feel themselves in constant danger of being sent to jail as conspirators and criminals; and the consequent fear and sense of injustice bred by such cases has clearly not made for social peace.

Among those who depart from the historically correct doctrine that either criminal means or a criminal end must be proved to constitute a criminal conspiracy, there is, almost inevitably, the widest disagreement. Some would hold criminal a combination to commit any act *contra bonos mores* or offensive to the general moral sense of the community. Others would confine the crime of conspiracy to combinations to commit only *illegal* acts, including under "illegal" breaches of contract as well as torts; still others would confine the offense to combinations to commit torts; and a fourth group would find a crime in the case of some torts and not of others. The wideness of this disagreement itself makes for great unpredicability. If the doctrine includes combinations to commit acts *contra bonos mores*, it amounts to nothing more nor less than a device to convict defendants who concededly have violated no pre-established law whenever individual judges deem it for the interest of society so to do, — a return to justice without law. If the doctrine is confined to combinations to commit some kinds of torts but not all, there is an almost equal lack of predicability; for the courts which have suggested this have found it so impossible to draw the line between those torts which will make a combination to procure them criminal and those which will not that they have scarcely even attempted it; and utter unpredicability results. If the doctrine covers combinations to commit *all* torts, the objections based on lack of predicability lose much of their weight. But new objections arise. The result would be practically to turn every tort, planned by more than one person, into a crime. That is, the courts would be adding to the penalty worked out by the law of torts (compensation), an added criminal punishment (imprisonment) wherever more than one helped to procure the act which constitutes the tort. This would mean a

[71] See, for example, State *v.* Dalton, 134 Mo. App. 517, 114 S. W. 1132 (1908).

revolutionary step in the law, and one of very questionable policy, to say the least.[72] Have courts, in the entire absence of legislation, a right by judicial decision alone to take such a revolutionary step?

In spite of countless assertions in the older cases that judges find the law but do not make it, we must recognize frankly that courts do make law or legislate, and further that that is a necessary part of their judicial function. Nevertheless, one must not lose sight of the fact that judicial legislation must always differ fundamentally from legislative law making. The latter is governed purely by expediency. The legislator's only guiding principles are the economic or social or political welfare of his people. His eye must be to the future; precedents mean nothing to him. The judge, on the other hand, in making new law is not free to follow his own ideas of what would make for the social or economic welfare of the people. He is bound and restrained by established and recognized legal doctrines and principles. For instance, no matter how firmly convinced a common-law judge might be that the Anglo-American doctrine that consideration is necessary to make a promise binding is immoral and unsocial, no matter how strongly he may feel that the continental doctrine requiring no consideration for contracts would better promote the general welfare, the judge would have no right by judicial legislation to overturn at a stroke the established and well-recognized principle underlying the common law of contracts. No one has stated this better than Justice Holmes, in the case of *Stack* v. *New York, etc. Railroad.*[73]

"We agree," he says, "that, in view of the great increase of actions for personal injuries, it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power. We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon

[72] There would seem to be little room for doubt that no court or legislature, squarely facing and comprehending the situation, would be willing to turn every tort planned by more than one, into a crime.

[73] 177 Mass. 155, 158, 58 N. E. 686 (1900).

a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain."

Seventeen years later, speaking in the United States Supreme Court, in the case of *Southern Pacific Co.* v. *Jensen*,[74] Justice Holmes again admirably expressed the same idea.

"I recognize without hesitation," he said, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

Thus it would seem clear that even were it wise to take such a step as to turn into crimes when planned by more than one person all those acts[75] which through long-established usage have come to be held tortious but not criminal, no judge by the method of judicial legislation has the right to do so. A step of so very questionable a nature and so revolutionary and sweeping in its character must be taken, if at all, by the legislature. During the seventeenth century, when the law was undergoing a period of exceptional and vigorous growth, when morals were being largely infused into the law and many new doctrines introduced, the courts went much further in judicial legislation than to-day. Yet even the seventeenth-century judges never went so far as to lay down the doctrine that all combinations to commit torts are criminal.

Those who preach the doctrine that a conspiracy may be criminal although neither the means used nor the end pursued is criminal, resort for the most part to an argument founded upon the danger of combinations to the community. If it is the function of the

[74] 244 U. S. 205, 221 (1917).

[75] As is readily apparent from the context, the word "acts" here is used in its common sense of including not simply "voluntary muscular contractions," but the immediate and direct effects of such voluntary muscular contractions as well.

criminal law to protect the social welfare, they argue, whatever causes peculiar danger to the social welfare should come under the ban of the criminal law. Although a single individual's design to commit a tort is not usually criminal because not of sufficient danger to the state, yet where several combine and conspire to commit a tortious act, the increased power for wrong is so magnified, the danger to the public welfare which arises from such a nefarious plotting is so threatening, that the criminal law should be extended to cover this increased danger. As Bishop says in his *Criminal Law*,[76] adopting the words of the English Criminal Law Commissioners of 1843:

"The general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary were the same thing proposed, or even attempted to be done, by any person singly." [77]

Such forms of statement are very persuasive. One does not wonder that the idea has gained many adherents. Yet the danger argument is open to serious objection. The short answer to it is that if every combination to commit a tortious act does in fact so increase the danger to the state that the criminal law should undertake to prevent it, it is for the legislature, and not for the courts, to make the first move in the matter. It is always open to the legislature to declare what is so dangerous to the state that it should be branded as criminal. It is not open to the courts by sweeping judicial legislation to turn into common-law crimes every combination to commit a tortious act.

But there is another objection to the danger argument which

---

[76] 2 BISHOP, NEW CRIMINAL LAW, § 180, quoting from Seventh Rep. Crim. Law Com., 1843, p. 90.

[77] A number of judges have expressed the same idea. See, for instance, State *v.* Dalton, 134 Mo. App. 517, 535, 114 S. W. 1132 (1908), where Justice Nortoni, rendering the decision in a lower Missouri court, says: "It may be stated as a general proposition that where an additional power or enhanced ability to accomplish an injurious purpose arises by virtue of the confederation and concert of action, an element of criminal conspiracy is thereby introduced which will render sufficiently criminal either the means or the purpose otherwise merely unlawful, to sustain a conviction, although the means or the end were not such as are indictable if performed by a single individual." See also Comm. *v.* Judd, 2 Mass. 329, 337 (1807), per Parsons, C. J.; United States *v.* Lancaster, 44 Fed. 896 (1891) (per Spear, J.).

perhaps strikes still deeper. The whole argument is based essentially upon a false premise. It is based upon the sweeping generalization that the design to commit acts which are tortious or which are *contra bonos mores* is of far greater danger to the state when conceived by a combination than when conceived by a single person. But in these days of huge and powerful corporations, which form in the eyes of the law single persons, such a generalization would seem far too sweeping to accord with the actual facts of every-day life. Why should the law be such that if two steel workers plan a certain act which the law regards as tortious, they should be subject to fine and imprisonment; but if, let us say, the United States Steel Corporation plans and executes the self-same act, the criminal law should be unable to touch it? Is the danger to the state really greater in the first case than in the second? Why should a combination of individuals to commit an act which the law regards perhaps as tortious but not as criminal constitute a crime if the individuals are not incorporated, but be free from crime if they are incorporated? Is that justice? Is not the generalization upon which the danger argument is based, after all, far too hastily made and too frequently out of accord with existing facts, to furnish a sound basis for an all-important legal doctrine?

IV

So far as the state of authorities goes, apart from one outstanding exception it is exceedingly doubtful whether the majority of actual decisions, either in England or America, supports the constantly reiterated statement that to constitute a criminal conspiracy neither the object pursued nor the means used need necessarily be criminal. The fraud cases constitute the exception. They follow the doctrine which arose out of the seventeenth century development of the law of cheats. During the seventeenth and the earlier part of the eighteenth centuries the law of cheats was very unsettled; and numerous cases were prosecuted, some under individual indictments and others under indictments for conspiracy, which did not involve public frauds and which did not fall strictly under the statute of false tokens.[78] Unconsciously, these seventeenth and eighteenth century courts were greatly ex-

[78] 33 HEN. VIII, c. 1.

tending the law of cheats so as to make the law conform more closely to prevailing ideas of morality. When, later in the eighteenth century, the courts began to recede from their seventeenth-century pretensions, several cases were decided holding that private unfair dealings where no false token was used were not indictable in the case of individuals; [79] but in the case of conspiracies, the courts reserved their criminality. What followed was perhaps only natural. The notorious deficiencies of the criminal law of cheats provoked the judges into supplying its gaps through the method of criminal conspiracy; what really amounted to judicial legislation to cure the shortcomings of the misshapen criminal law and the silence of the legislators, was hidden behind the convenient Hawkins doctrine. The judges felt the injustice of allowing bands of manifest criminals, combining to defraud others of their property, from escaping punishment because of the criminal law's absurd deficiencies; and the result was that hard cases made bad law. In view of what has already been said the doctrine of these fraud cases, allowing conspiracy indictments where the fraud would not of itself be indictable would theoretically seem open to very serious question; but in view of the numerous decisions supporting this doctrine in cases of fraudulent representations, the fraud cases must be recognized as an acknowledged exception to the general rule. The effect of the doctrine upon modern law is in many respects very unfortunate. The law of criminal conspiracy as to fraud cases has lost well-nigh all predicability; it is almost impossible to-day to foretell whether a conspiracy conviction can be had for concerted misrepresentation or not. No one knows exactly what constitutes the fraud necessary to support such a conviction. Must it be such fraud as would be good ground for setting aside a contract? Or must it be such as would support an action for damages? Does it differ from the kind of pretense necessary to support an indictment for obtaining property by false pretenses, and if so, in just what respect? Will a mere false promise suffice? Where the purpose to cheat is plain, but the proposed deceit is such that it could not possibly actually deceive the victims, may a conspiracy indictment be had? A glance through the innumer-

[79] See, for instance, Rex *v.* Wilders, cited in 2 Burr. at 1128 (1720); Rex *v.* Bryan, 2 Stra. 866 (1730); Rex *v.* Wheatley, 2 Burr. 1125 (1761).

able fraud cases is sufficient to reveal the legal morass into which the law has strayed as a result of following in these cases the Hawkins doctrine.

Quite apart from the fraud cases, the notion gleaned from the Hawkins statement and from the leading text-writers who have been following in Hawkins' footsteps ever since, has gained the widest currency. If one were to consider all the *dicta* and unsupported statements of judges and text-writers, he would unquestionably find the very great majority in support of the doctrine that to constitute a conspiracy neither the end pursued nor the means used need necessarily be criminal. Such is the common statement, which in the words of Hobbes passes "like gaping from mouth to mouth." Yet the actual decisions, apart from the fraud cases, lend small support to the prevalent conceptions. Statements are copied from one text-book into another, and then into the encyclopædias of law; and long and formidable lists of cases are cited to support the statements. But when these lists of cases are carefully analyzed, it will be found that frequently the majority of them are cited for mere *dicta* or loose general remarks; and that of the actual decisions, not since overruled, almost all are fraud cases.

Two illustrations will suffice. Bishop in his *Criminal Law*, speaking of the crime of conspiracy, says: [80] "The unlawful thing proposed, whether as a means or an end, need not, to constitute a punishable conspiracy, be such as would be indictable if proposed or even done by a single individual." In support of this statement he cites three American and two English cases. Of the three American cases, *State* v. *Rowley*,[81] is a conspiracy to cheat and defraud and apparently fell directly within the terms of a state statute against cheating by false pretenses; *State* v. *Burnham*,[82] has been in effect apparently overruled by *State* v. *Straw;*[83] and *People* v. *Richards*[84] seems to have been also overruled by *Alderman* v. *People*.[85] The American cases cited, therefore, furnish very doubtful support for Bishop's statement. Of the two English cases cited both are conspiracies to cheat and defraud.

---

[80] 2 BISHOP, NEW CRIM. LAW, 8 ed., § 181 (1).
[81] 12 Conn. 101 (1837).
[82] 15 N. H. 396 (1844).
[83] 42 N. H. 393 (1861).
[84] 1 Mich. 216 (1849).
[85] 4 Mich. 414, 432 (1857).

Among the more recent statements is that in the encyclopædia of law now being prepared under the name of *Corpus Juris*. Under the heading of "Conspiracy" occurs the following unqualified statement: [86] "It is not essential, however, to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted." This statement is supported by so long a list of cases (with none cited *contra*) that he must be bold of heart who would venture to deny the authority back of the statement. Yet if one has the patience to analyze the decisions, case by case, as authorities for the statement quoted they fall like a house of cards. In all, thirty-seven American cases are cited. Of these, no less than ten are apparently conspiracies to commit *criminal* offenses, and therefore have no authority beyond that of mere *dicta;* seven are indictments under state statutes relating to conspiracy; three are civil actions; two have in effect been overruled by later cases within the jurisdiction; and in two the defendants were held not guilty. Sixteen of the decisions were fraud cases. When one thus analyzes the long list of authorities, he finds that, apart from the fraud cases, there are at most six or seven actual decisions supporting the statement. Of these, two were early cases for seducing or enticing away an infant girl without her father's consent, — cases which, like the fraud decisions, should perhaps be recognized as another exception to the ordinary doctrine; [87] two were in lower state courts, and should therefore hardly be regarded as authoritative, at least outside of Missouri and New Jersey, where they were decided. Of the two remaining cases, one is *State* v. *Donaldson*,[88] which was said in the later New Jersey case of *Jersey City Printing Co. v. Cassidy*,[89] to embody a doctrine which "may be regarded as entirely exploded," [90] and the other was *State* v. *Bienstock*,[91] which probably should be classed among the fraud cases. "We think,

[86] 12 C. J. 547.

[87] Such cases seem to rest largely upon the authority of the English eighteenth-century case of Rex *v.* Delaval, 3 Burr. 1434 (1763). But, as Wright remarks (CRIMINAL CONSPIRACY, p. 32): "It can hardly be doubted that . . . the acts proposed were indictable at the date" of that case, "independently of combination, on the principle . . . that conduct grossly contrary to public morals or public decency was punishable irrespectively of combination."

[88] 32 N. J. L. 151 (1867).

[89] 63 N. J. Eq. 759, 762, 53 Atl. 230 (1902).

[90] See quotation in note 51, *supra*.

[91] 78 N. J. L. 256, 73 Atl. 530 (1909).

therefore," said the court in reaching its decision [92] "that the object of the conspiracy was unlawful, . . . and that this unlawful object was designed to be accomplished by deceit and fraud, was a cheat reaching large numbers of persons and tended to their oppression." [93]

On the following page of *Corpus Juris* the further statement is made [94] that "it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal." But five American cases and one English case are cited in support of this. Of the five American cases, the first is one where the defendants were held not guilty; the second is the decision of merely a lower state court; the third case seems to have been later overruled; the fourth was the case of a conspiracy to commit an act which was illegal; [95] and the fifth was a conspiracy to commit a criminal offense. The English case of *Rex* v. *Delaval* was a conspiracy to commit what was probably a criminal offense.[96]

These examples will suffice to show how plentiful and common are loose *dicta* scattered through the cases following the Hawkins doctrine, but how few actual decisions, apart from the fraud cases, can be actually mustered out in its support. On the other hand, decisions are not lacking which squarely decide against the Hawkins doctrine. In *Rex* v. *Turner*,[97] already discussed, Lord Ellenborough clearly rejects the doctrine; and although the decision has been criticized by some,[98] it has been followed by later cases, such as *Rex* v. *Pywell*.[99] Similar decisions are to be found among the American cases. In the case of *Commonwealth* v. *Prius*,[100] for instance, Justice Bigelow refused to convict for a conspiracy to overinsure certain goods, saying: "It was not a crime in the de-

[92] 78 N. J. L. 256, 274, 73 Atl. 530 (1909).

[93] One other possible decision in support of the text statement, not a fraud case, is Lanasa *v.* State, 109 Md. 602, 71 Atl. 1058 (1909). This was an indictment for a conspiracy willfully and maliciously to injure and destroy property. But in this case the evidence seems abundantly to prove the commission of acts which would be criminal quite apart from the combination or conspiracy.

[94] 12 C. J. 548.

[95] See 78 N. J. L., 256, 274, where the court says, "We think therefore that the object of the conspiracy was unlawful."

[96] See note 87, *supra*.

[97] 13 East 228 (1811).

[98] See, for instance, Lord Campbell, C. J., in Reg. *v.* Rowlands, 5 Cox 436, 490 (1851).

[99] 1 Starkie, 402 (1816).

[100] 9 Gray (Mass.) 127 (1857).

fendants to procure an over-insurance on their stock in trade. It was at most only a civil wrong. The charge of a conspiracy to do so does not therefore amount to a criminal offence."

V

In some jurisdictions special statutes have been passed to regulate the law of conspiracy; certain of these set at rest such questions as have formed the subject of the foregoing discussion. In the federal courts, for instance, the Hawkins doctrine no longer lives. The federal conspiracy statute [101] provides that

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, imprisoned not more than five years, or both."

This important statute, as is evident from its terms, follows in the main sound principles of law, and except in cases of defrauding makes impossible a federal conspiracy conviction where no federal criminal offense has been conspired. What uncertainty has arisen from the act has centered chiefly in the somewhat doubtful meaning of the words, "defraud the United States." [102] It will be noticed that the statute, unlike the common law, requires the commission of some overt act other than the mere act of conspiring.[103]

In conclusion, the fundamental similarity may be pointed out between the principles of the law of criminal and those of civil conspiracy. The one is a crime and the other a tort, and naturally, therefore, certain marked differences must exist between them.[104]

---

[101] U. S. COMP. STAT., 1918, § 10201.

[102] See 2 ZOLINE, FEDERAL CRIMINAL LAW, §§ 1038 *et seq.*

[103] In a number of states important conspiracy statutes exist, which must often be referred to in order to avoid misunderstanding the significance of decisions rendered within such states. See, for example, the New York Conspiracy statute (N. Y. PENAL LAW, § 580).

[104] The differences between criminal and civil conspiracy need not here be dwelt upon. The most striking difference is as to the necessity of some overt act. Since civil conspiracy is a tort, and since the tort remedy is compensation paid for damages suffered, no right of action exists without proof of damage; and damage comes through overt acts. In other words, unlike the law of criminal conspiracy, in civil conspiracy some overt act other than the mere conspiring must be proved. As the courts say,

Yet the fundamental principles underlying the two are essentially the same. Just as in criminal conspiracy acts not criminal when committed by individuals should not be held criminal when committed by combinations, so in civil conspiracy acts not tortious when committed by individuals should not be held tortious when committed by combinations. The mere combination cannot add illegality in the latter case any more than it can add criminality in the former. Yet, as in the criminal conspiracy cases, there is a prevalent and widespread notion abroad that in some mystical way a combination can be called a conspiracy and conspiracy lends illegality. It is only another phase of the same confusion of thought already discussed. In the case of *Lindsay and Company* v. *Montana Federation of Labor*,[105] the court squarely rejects such a doctrine in these words:[106]

"There can be found running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert, and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose such right merely by acting with others, each of whom is clothed with the same right. If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other words, the mere combination of action is not an element which gives character to the act."

So, Justice Holmes, in his dissenting opinion in the case of *Vegelahn* v. *Guntner*,[107] said:

"But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle."

---

the gist of the action is the damage, and not the conspiracy. In Savile *v.* Roberts, 1 Ld. Raym. 374, 378, it was said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie." See also Adler *v.* Fenton, 24 How. (U. S.) 407 (1860).

[105] 37 Mont. 264, 96 Pac. 127 (1908).

[106] *Ibid.*, 273.

[107] 167 Mass. 92, 107, 108, 44 N. E. 1077 (1896).

And Chief Justice Parker, rendering the opinion of the court in *National Protective Association* v. *Cumming*,[108] expressed the same idea when he said: "Whatever one man may do alone, he may do in combination with others provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act." [109]

Perhaps enough has been said to make it evident that it is high time to abandon the prevalent and often repeated idea that mere combination in itself can add criminality or illegality to acts otherwise free from them. Such a doctrine grew out of an historical mistake, and has no real basis in our law. It is logically unsound and indefensible. Moreover, it is dangerous. It tends to rob the law of predicability, and to make justice depend too often upon the chance prejudices and convictions of individual judges. It has tended to make the law chaotic and formless in precisely those situations where the salvation of our troubled times most demands a precise and understandable law. Because under its cover judges are often free to legislate or to decide great social issues largely in accordance with their personal convictions, it has rendered the courts open to the bitter and constant cry of class partisanship. It is a doctrine as anomalous and provincial as it is unhappy in its results. It is utterly unknown to the Roman law; it is not found in modern Continental codes; few Continental lawyers ever heard of it. It is a fortunate circumstance that it is not encrusted so deep in our jurisprudence by past decisions of our courts that we are unable to slough it off altogether. It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases, — when the Hawkins doctrine at last will be conclusively laid to rest! *Requiescat in pace!*

Francis B. Sayre.

HARVARD LAW SCHOOL.

---

[108] 170 N. Y. 315, 63 N. E. 369 (1902).

[109] See also Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 234, 55 N. W. 1119 (1893); Macauley Bros. *v.* Tierney, 19 R. I. 255, 264, 33 Atl. 1 (1895); Clemmitt *v.* Watson, 14 Ind. App. 38, 42 N. E. 367 (1895). Needless to say, numerous statements are also to be found holding to the contrary.